# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 12, 2007 |
| v | No. 265908<br>Wayne Circuit Court |
| DAVID DEMOND BRYANT,<br><br>Defendant-Appellant. | LC No. 05-005175-01 |

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of one to four years for the assault conviction, one to five years each for the felon in possession and CCW convictions, and a consecutive five-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

## I. Underlying Facts

In April 2005, the complainant lived in a Detroit home with his wife Louise Scott-Curry, their children, his stepdaughter Tamicka Scott, and his niece Kevina Scott. Defendant was Tamicka's boyfriend, intermittently. Kevina indicated that on April 8, 2005, defendant and Tamicka had an argument. The complainant testified that on April 9, 2005, he called defendant's parole officer and defendant's sister because he believed that defendant had poured gasoline around his house. The complainant indicated that defendant later called and threatened him. The complainant further indicated that at approximately 8:00 p.m., Kevina told him that defendant had been driving around the block. Kevina testified that defendant circled the block three or four times.

The complainant explained that between 8:30 and 9:00 p.m., he went to retrieve a phone number from his car in order to call into work because he was afraid to leave his house. As he was walking toward the house, he heard a car tire squeal, and saw defendant get out of a car with a gun in his hand. Kevina testified that defendant was driving a tan car, and she saw the trunk pop open before defendant emerged from the car pointing a black handgun at the complainant. The complainant indicated that defendant pointed a nine-millimeter handgun at him from less than ten feet away, and threatened to kill him. Both the complainant and Kevina testified that

defendant then went to the trunk of his car and brandished a long gun, which the complainant described as an AK-47. The complainant was in shock and backed onto his porch, and Kevina pulled him into the house. The complainant gathered his family, and subsequently called the police.

At trial, defendant testified and denied any wrongdoing. Defendant admitted that he was at the complainant's house between 8:30 and 9:00 p.m., but denied possessing any weapons or circling the block. He claimed that the complainant had called him, and requested that he come over so they could talk. He stayed there for two to three minutes, but left at Tamicka's urging after the complainant yelled and "cussed" at him.

Tamicka testified on defendant's behalf. She indicated that when defendant arrived, he and the complainant had a verbal exchange. The complainant allegedly told defendant that he knew he was on parole, and he was going to get defendant's "a** locked back up." Tamicka testified that defendant did not have any weapons, and did not act in a threatening or aggressive manner. On rebuttal, Scott-Curry testified that at the time of the incident, Tamicka was sleeping in a back bedroom of the house.

## II. Waiver of Trial by Jury

Defendant first argues that his waiver of his right to a jury trial was not voluntarily, intelligently, and understandingly made. Defendant claims that his waiver was based on defense counsel's coercion, "emotional pressure," and false claims that no jurors were available and that he would have to wait two months for a jury trial.

A trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

A defendant's waiver of his constitutional right to trial by jury must be made voluntarily, intelligently, and knowingly. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998); *People v Reddick*, 187 Mich App 547, 549; 468 NW2d 278 (1991). MCR 6.402(B) sets forth the procedure for securing a proper jury trial waiver:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Here, after being advised that the defendant wished to waive his right to a jury, the trial court questioned defendant to confirm that wish. Defendant confirmed that he freely and voluntarily, without any threats or promises, wished to waive his right to a jury trial.

The record demonstrates that the trial court complied with the requirements of MCR 6.402(B), and that defendant unequivocally testified on the record that he made the decision

freely and voluntarily. Defendant's claim that his waiver was based on coercion, "emotional stress," and false information is contrary to the record made in open court and, therefore, must be rejected. See *People v Gist*, 188 Mich App 610, 611-612; 470 NW2d 475 (1991). Further, a trial court is not required to engage in a colloquy with a defendant to determine whether a jury waiver is predicated on misleading statements. *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993); *People v Margoes*, 141 Mich App 220, 223-224; 366 NW2d 254 (1985).

In addition, defendant completed a waiver form, as prescribed by MCL 763.3.[1] Defendant suggests that the waiver form was ineffective because it lists an incorrect charge, i.e., bank robbery. But defendant fails to cite any authority for his argument. This Court will not search for authority to support or reject a party's claim. *People v Smielewski*, 214 Mich App 55, 64 n 10; 542 NW2d 293 (1995).[2] We find no authority for the proposition that where a party clearly waives his right to a jury trial in open court, an error in the charge stated in the written waiver form vitiates the voluntariness of the waiver made in open court.

Consequently, the trial court did not clearly err by accepting defendant's waiver of jury trial.

III. Improper Questioning by the Trial Court

We reject defendant's claim that the trial court's questioning of a witness deprived him of a fair trial. Defendant claims that the trial court impermissibly reversed its previous ruling

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[1] MCL 763.3 provides:

> (1) In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing signed by the defendant and filed in the case and made a part of the record. The waiver and election shall be entitled in the court and case, and in substance as follows: "I, _____, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."
>
> _____
>
> Signature of defendant.
>
> (2) Except in cases of minor offenses, the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel.

[2] This argument is also waived because it was not raised in defendant's statement of questions presented. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

precluding the prosecutor from adding a witness, the complainant's wife Louise Scott-Curry, and called and questioned the witness on rebuttal.

Because defendant failed to object to the trial court's questioning of the witness, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Initially, "[t]he trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion." *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). To establish that the trial court abused its discretion, a defendant must demonstrate that the court's ruling resulted in prejudice. *People v Williams*, 188 Mich App 54, 59-60; 469 NW2d 4 (1991).

At the beginning of trial, the prosecutor moved to amend the witness list to add Scott-Curry to testify that she observed defendant pour gasoline around their house on the day before this incident. In denying the prosecutor's motion, the trial court explained that defendant was not given proper notice of the proposed evidence under MRE 404(b), and thus it would not allow "that testimony" of Scott-Curry. During the defendant's case, credibility issues arose regarding Tamicka's whereabouts during the incident, and Curry's actions. The trial court thereafter allowed the prosecutor to call Scott-Curry as a rebuttal witness to testify about those matters, which were unrelated to the MRE 404(b) uncharged conduct. The trial court did not abuse its discretion by allowing the witness to testify on rebuttal.

Further, a trial court may question witnesses in order to clarify testimony or elicit additional relevant information. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996); MRE 614(b). A trial court's discretion to question witnesses "is greater in bench trials than in trials before juries." *People v Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980). Here, the trial court briefly questioned Scott-Curry regarding Tamicka's location and Curry's actions after he came into the house. The court's questioning was limited in scope, material to the issues in the case, posed in a neutral manner, and neither added to nor distorted the evidence. See *Davis*, *supra*. The fact that the testimony elicited may have damaged defendant's case does not demonstrate that the trial court's questioning was improper. *Id.* Further, the trial court's questions were not "intimidating, argumentative, prejudicial, unfair, or partial," *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986), and it cannot reasonably be argued that the trial court was improperly influenced by its questioning of the witness. *People v Wilder*, 383 Mich 122, 125; 174 NW2d 562 (1970). Consequently, this unpreserved claim does not warrant reversal.

## IV. Prosecutorial Misconduct

Defendant also argues that he was denied a fair trial because the prosecutor impermissibly questioned defendant's credibility by commenting on his presence during trial. We disagree.

Because defendant failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *Carines*, *supra*.

During closing argument, the prosecutor stated:

> When you listen to the testimony of the Defendant again, he testified that he just went around and argued, and [the complainant] was clowning on him. I mean, that testimony is just, it, it - he's been sitting here the whole time again. It - you have to question his credibility.

In *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985), our Supreme Court held that it was proper for a prosecutor to comment on a defendant's opportunity to conform his testimony to that of the other witnesses because he sat through the trial and heard their testimony. The prosecutor in *Buckey* commented that the defendant had reviewed the police reports, sat through the preliminary examination, and sat through the witnesses' testimony at trial. *Id.* at 6-7. The Court held that opportunity and motive to fabricate testimony are permissible areas of inquiry of any witness. *Id.* at 15. The Court also stated that the prosecutor's comments only indirectly related to the defendant's right to be present at the trial and that any resulting inference was not directly of guilt, but rather that the defendant had the opportunity to conform his testimony because he heard other witnesses testify. *Id.* at 14. The Court held that a prosecutor may not argue that a defendant fabricated testimony in every case where a defendant sits through the trial, but when the evidence supports that inference, the argument is a "perfectly proper comment on credibility." *Id.* at 16.

Here, defendant's credibility was clearly at issue. As such, the prosecutor properly could comment on the inference that defendant tailored his testimony to what was contained within Tamicka's testimony. But even if the prosecutor's remark was improper, we are not persuaded that it affected this bench trial verdict. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). A review of the record shows that the trial court found defendant guilty on the basis of properly admitted evidence. Consequently, reversal is not warranted on this basis.

## V. Ineffective Assistance of Counsel

Defendant contends that a new trial is required because defense counsel was ineffective, or alternatively, that remand is necessary to enable him to develop this claim.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

A. Bench Trial

We reject defendant's claim that he is entitled to a new trial because defense counsel coerced him into waiving trial by jury, as discussed in part II of this opinion. On this record, defendant has failed to meet his burden of showing that defense counsel coerced him to waiving his right to a jury trial. Even if this Court assumes that defendant relied on defense counsel's advice in making his decision, we must assume defense counsel had a legitimate reason for waiving trial by jury and that defendant agreed with the position because, in the final analysis, the decision to waive a jury ultimately rests with the defendant. MCR 6.402(B). Indeed, defendant definitively stated that it was his decision to proceed with a waiver trial, and that he was doing so freely and voluntarily. Given defendant's definitive statements on the record, defendant cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Defendant is not entitled to a new trial on this basis.

B. Failure to Produce an Eyewitness

Defendant further argues that defense counsel was ineffective for failing to call Michael January to testify on his behalf. January averred in an affidavit that he saw defendant arrive at the complainant's house, get out of the car, and walk back to his open trunk before leaving. He did not see defendant hold or brandish any firearm, or say or do anything.

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Although the proposed evidence may have supported defendant's claim that he did not have a firearm, it does not fully coincide with defendant's testimony at trial. Defendant testified that when he arrived at the complainant's house, he got out of the car, and the complainant immediately approached him while cussing and yelling. He cussed back at the complainant, but then left upon Tamicka's urging. He explained that he "left as soon as [he] got there." Defendant did not indicate that he had popped his trunk, or that he stood by the trunk for some minutes while he was in front of the house. But the proposed evidence placed defendant at the rear of his car next to the open trunk for a couple of minutes. Also, defendant admitted that he cussed back at the complainant, while January averred in his affidavit that defendant "*did not say* or do anything." Given the weight of the evidence in this case, and the discrepancy created by the proposed evidence, it is highly unlikely that defense counsel's failure to call the potential witness deprived defendant of a substantial defense. Consequently, defendant has not demonstrated that defense counsel was ineffective for failing to call the witness.

C. Introduction of Damaging Evidence

Defendant further argues that defense counsel was ineffective for eliciting the damaging evidence that on the day before the incident defendant poured gasoline around the complainant's house, after the trial court had previously precluded that evidence. Decisions about what questions to ask are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant has not overcome the presumption that defense counsel's decision was reasonable trial strategy, nor has he shown that the evidence affected the outcome of the proceedings. During defense counsel's cross-examination of the complainant, he elicited evidence that the complainant was scared of defendant because he had poured gasoline around his house. Defense counsel was apparently attempting to discredit the complainant's testimony by providing a reason why the complainant would falsely accuse defendant of threatening him with a firearm. Indeed, this coincided with defendant's trial testimony that the complainant said that he was "gonna get [him] locked up with [his] parole agent." Given that the complainant's testimony was the chief evidence against defendant, attacking his testimony was crucial. Defendant's complaint is that counsel was "ineffective" in doing so. But this Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id*. Further, given the weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted if defense counsel had not questioned the complainant about the matter. *Effinger*, *supra*. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

D. Personal Protection Order

Defendant argues that he is entitled to a new trial because defense counsel was ineffective for failing to discover that a personal protection order ("PPO") that Tamicka obtained against defendant was not issued until two months after the incident, and therefore any reference to the PPO during trial was improper. We disagree.

At trial, the complainant testified that Tamicka "had a PPO on [defendant]." On cross-examination, Tamicka testified that she had obtained a PPO against defendant, but could not recall if it was obtained before or after this incident. Defendant testified that at the time of the incident the PPO "wasn't, didn't go through," and he and Tamicka "were still together" and had "reconciled their differences."[3]

Given the weight of the unchallenged evidence introduced at trial, it is unlikely that the challenged evidence affected the outcome of the case. There was unchallenged evidence that defendant and Tamicka had a tumultuous relationship. Tamicka, who testified for the defense, indicated that she and defendant had problems in the past, and that she had made police reports against him The complainant testified that he had accompanied Tamicka to the police station "a

[3] According to the presentence report, the PPO was issued on June 9, 2005.

few times" concerning defendant. Consequently, even if defense counsel failed to discover the issuing date of the PPO, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's failure, the outcome would have been different. *Effinger, supra*.

E. Failure to Object to Reopening the Proofs

We reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's motion to reopen the proofs to present evidence of defendant's ineligibility to possess a firearm. After the proofs were reopened, the parties stipulated that defendant was convicted of a specified felony, and thus, was ineligible to possess a firearm.

On appeal, defendant does not claim that the prosecutor gained an undue advantage, that he was surprised by the evidence, or that he would have done anything differently had the evidence been presented timely. See *People v Herndon*, 246 Mich App 371, 420; 633 NW2d 376 (2001) (relevant considerations for reopening proofs are whether the moving party would take any undue advantage and whether the nonmoving party can show surprise or prejudice). Defendant only argues that defense counsel should have objected. But defendant has failed to demonstrate, or even argue, that, had defense counsel objected to the prosecutor's motion, it would have been successful. The trial court had discretion to allow the prosecutor to reopen the proofs, *id.* at 419, given that the prosecutor's inaction was an obvious oversight, she moved to reopen the proofs moments after she rested her case, defendant had not yet commenced the defense, and defendant was undoubtedly aware of the charge against him. Indeed, mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved. See, e.g., *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). Because there was no reasonable basis to object, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

F. Failure to Object to the Prosecutor's and Trial Court's Misconduct

We reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of error discussed in parts III and IV of this opinion. In light of our conclusion in part III that the trial court was allowed to question the witness, and our conclusion in part IV that the prosecutor's remark did not deny defendant a fair trial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*.

For these reasons, we reject defendant's claim that defense counsel was ineffective and are not persuaded that a remand is necessary.

VI. Sufficiency of the Evidence

Defendant also argues that the evidence was insufficient to sustain his conviction of felony-firearm because there was no evidence that he possessed an operable firearm. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and

determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). It is well established that this Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be proved by circumstantial evidence and reasonable inferences arising from the evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find that defendant possessed a firearm. Two witnesses testified that defendant possessed two different weapons during the incident. Both Kevina and the complainant testified that defendant pointed a black handgun at the complainant, and then retrieved a long gun from the trunk of his car. The complainant testified that the black handgun looked like a nine-millimeter weapon, and the long gun looked like an AK-47. The complainant explained that he was in the military for seven years, and was familiar with guns. Contrary to defendant's argument, the prosecution was not required to prove that the firearms were operable. "Operability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991); see also *People v Peals*, 476 Mich 636, 638, 650, 653-655; 720 NW2d 196 (2006) (the offense of felony-firearm "do[es] not require proof that the firearm was "operable" or "reasonably or readily operable."). In sum, the evidence was sufficient to sustain defendant's conviction of felony-firearm.

## VII. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis